7-28-2014

# Hennefer v. Blaine County School Dist. Respondent's Brief Dckt. 41286

IN THE SUPREME COURT OF THE STATE OF IDAHO

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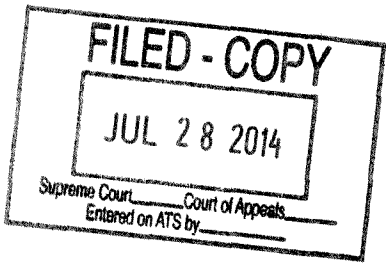
| DENNIS HENNEFER and MARYANN HENNEFER, individually and as the parents of Austin Hennefer, deceased, | ) | Docket No. 41286-2013 |
| Plaintiffs/Respondents/ Cross Appellants | ) | |
| v. | ) | |
| BLAINE COUNTY SCHOOL DISTRICT #61, | ) | |
| Defendant/Appellant/ Cross Respondent | ) | |
| and | ) | |
| SERGIO LOPEZ-RODRIGUEZ, | ) | |
| Defendant. | ) | |

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# RESPONDENTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Blaine County
Honorable Robert J. Elgee, District Judge, Presiding

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## I.

## STATEMENT OF THE CASE

Pursuant to I.A.R. 35(b)(3), the Hennefers submit its statement of the case to the extent that the Hennefers disagree with the statement of the case set forth in the School District's brief. .

### A. NATURE OF THE CASE

It is important to note that the liability of the School District is based entirely upon the actions of its employee, Jeff Mecham (hereinafter referred to as "Mecham"). Mecham was dismissed as an individual defendant given the admission that he was acting in the course and scope of his employment at the time of the collision. Mecham was in charge of the drivers safety class and instructed Austin Hennefer to perform a three-point turn at the time of the collision.

### B. THE COURSE OF PROCEEDINGS AND THE DISPOSITION

Mecham was dismissed as an individual defendant because the School District admitted he was acting in the course and scope of his duties as the drivers instructor at the time of the collision.

### C. STATEMENT OF FACTS

The Statement of Facts submitted by the School District contains a number of inaccuracies and totally omits the relevant evidence that proved the willful and reckless conduct of Mecham, the driving instructor. The jury concluded that Mecham was 100% at fault for causing the crash and that his conduct was willful or reckless.

The Hennefers will first address the misstatements contained in the School District's appeal brief. The facts supporting the Court and jury's conclusion that Mecham's conduct was willful or reckless will be addressed separately in the argument portion of this brief.

1. The Circumstances of the Collision Were Largely Undisputed.

The School District offers its opinion that "there was somewhat inconsistent evidence concerning the events of the accident." (Appellant's Brief, pg. 4.) That opinion is directly contrary to the Trial Judge's observation.

> There is really not much clash of credibility in this case. Some trials are a lineup of testimony of people saying one thing and an equal amount of people on the other side saying the other thing. . . . . That really didn't happen here. There is even, I would say, substantial agreement among the experts of what happened here. One expert I think overlaid his findings or conclusions on the other expert's, and it's remarkable how close they were. There's a few inches here and there, they differ by a few feet, but they really agree on the essential question of what happened. (Tr. Vol. II, p. 1289.)

Each crash investigator agreed that this was a T-bone collision that occurred in the final phases of a three-point turn maneuver near the middle of the road. Raul Ornelas, a Hailey police officer commuting to work was the fourth witness on the scene but the first police officer. He stated:

> A: Yes, there was damage to the Buick on the driver's side of the vehicle to where it looked like it was a T-bone collision. (Tr. Vol. I, p. 359, ll. 14 – 16.)

2. Mecham Instructed Austin Hennefer to Perform a Three-Point Turn on Highway 20 at 7:30 a.m.

The lead investigator for the Blaine County Sheriff, Officer Curtis Miller concluded:

> A: Based on the evidence that I observed at the scene, which was the marks, damaged vehicles, and the like, and statements from Mr. Lopez, statements from Ms. Mares, I felt very comfortable in determining that the School District vehicle was in the process of finishing a three—point turn when the collision occurred. (Tr. Vol. I, p. 417, ll. 20 – 25.)

Other facts that supported the conclusion of Capt. Miller were his findings that the transmission of the Buick was in drive at impact (Tr. Vol. I, p. 421, ll. 19-23.), the fact the road is too narrow to do a U-turn (Tr. Vol. I, p. 421, ll. 4 – 6), and Mecham has now admitted he was practicing a three-point turn.

> Q: (By Mr. Farley) Do you have any – well, let me ask you this. I mean, you've had others tell you that – I mean, obviously, during the course of this case it's become apparent that the Driver's Education car, you, Austin, Jennifer, were in the process of making a three-point turn at the time this accident happened, and you understand that; is that true?
>
> A: Yes. (Testimony of Jeff Mecham Tr. Vol. II, p. 925, ll. 7 – 14.) (Emphasis added.)

There can be no dispute that Mecham instructed Austin Hennefer to perform the three-point turn. The only witness alive and with a memory of the event, Jennifer Mares, testified:

> Q: (By Mr. Hepworth) So at some point it was clear enough for Austin to cross Highway 75. Tell us what happened after that.
>
> A: Well, at that point Mr. Mecham said – we drove for another little while going, west, and Mr. – after a while Mr. Mecham said up ahead

you're going to pull over and you're going to do a three-point turn and then we're going to switch drivers. (Tr. Vol. I, p. 480, ll. 18-24.) (Emphasis added.)

Thereafter, Jennifer Mares described how Austin Hennefer stopped on the side of the road, started doing the turn and pulled to the other side of the road and stopped. Put the car in reverse and backed over to the north side of the road and stopped. Then he put the car in drive again and started to pull forward to complete the turn. (See Tr. Vol. I, p. 481, ll. 23 – p. 482, ll. 17.)

As Austin Hennefer started pulling forward to complete the three-point turn Jennifer Mares lifted her head off the driver's seat head rest where she had been saying a prayer, looked out the window and saw the headlights of the Lopez car 40 feet away coming at them. (Tr. Vol. I, p. 480, ll. 25 – p. 4883, ll. 2.)

The School District's accident reconstruction expert that was hired the same day as the crash also agreed Mecham was completing a three-point turn:

Q: So you have concluded that they were trying to do a three-point turn, haven't you?

A: I have concluded that they were making a three-point turn. (Testimony of Jamie Maddux, Tr. Vol. II of II, p. 1045, ll. 8 – 11.)

The School District's expert also concurred with the testimony of Captain Miller that it was not physically possible for the Buick to do a U-turn at that location. (Tr. Vo. II of II, p. 1046, ll. 17 – 20.)

3. The Three-Point Turn was the Sole Cause of the Crash.

The defense reconstruction expert, Mr. Maddux, admitted the crash would not have happened if there had not been a three-point turn. Therefore, the School District's own expert supported the jury's finding that Mecham was 100% responsible.

> A: The Buick making a turn where it did certainly contributed to the collision. Had it not been making a turn there, no collision would have ever occurred. (Maddux, Tr. Vol. II of II, p. 1030, ll. 23 – 25.)

The School District's expert also admitted facts which prove the three-point turn "interfered" with traffic which is a violation of I.C. § 49-645(1).

> Q: (By Mr. Hawkins) Okay. As an officer, what do you think interfering is? If you make another car swerve or brake to avoid you, have you interfered with the other car?
>
> A: If your immediate actions cause another vehicle to immediately have to swerve in order to avoid you, yes, I would say that that is interference. (Tr. Vol. II, p. 1037, ll. 8 – 13.)

The jury properly concluded Mr. Lopez was not negligent. There was no dispute that he was diving at least 15 miles per hour under the speed limit. The School District's expert testified it was a 65 mph road (Tr. Vol. II of II, p. 1054, ll. 7 – 9) and that Mr. Lopez was diving 43 – 48 mph at impact. (Maddux, Tr. p. 1060, ll. 15 – 17.) The Trial Court made the following observations in its ruling denying the School District's post-trial motions.

> Let me talk a minute about – and I'll just call him Sergio to keep it short. He was driving at 15 miles per hour under the limit, it was a 65 mile per hour area. The experts had his speed at – I think they said they agreed between 43 and 48 miles an hour at impact, even though Sergio said he

> thought he was going 50. The point is that it was a reduced speed, and the jury did not find his speed inappropriate, and neither does the Court. (Tr. Vol. II, p. 1289, ll. 22 – p. 1290, ll. 4.)

4. The Lopez Honda was More Visible to Mecham Than the School District Buick was to Lopez.

The evidence was clear that it would have been difficult for Lopez to see the Buick given the car was sideways in the road when Lopez approached and only a side marker light would be visible. The Buick's headlights and taillights would not be visible. The School District's own expert testified civil twilight began at 7:35 a.m. and sunrise in Bellevue would be 8:05 a.m. (Maddux, Tr. Vol. II, p. 1050, ll. 11 - 18) Mr. Maddux admitted he did not visit the collision site at twilight to determine visibility (Tr. Vol. II, p. 1050, ll. 16 – 17) but he did admit the headlights of Mr. Lopez's vehicle would have been more visible to Mecham than the Buick's marker lights were to Lopez. (Tr. Vol. II, p. 1067, ll. 2-7)

The only expert to visit the crash site at twilight was the Hennefers' expert, Dr. Joellen Gill, a human factors expert. Dr. Gill went to the crash site to determine lighting and visibility using two vehicles at twilight. Dr. Gill concluded.

> A: In general terms, again, this wasn't attempted at all to be an accident reconstruction, it was just for my own information as to lighting and visibility. And what I determined with the lighting conditions that existed at the time I was there was that all that would have been visible to Mr. Lopez, which is very consistent with what he testified in his deposition, was a red light, a marker light, that was at the side of the vehicle. No headlights were at all visible. You couldn't really tell what it was, what the red light was or where the vehicle was oriented until we were in a position where our headlights actually illuminated the vehicle. (Tr. Vol. II of II, p. 1126, ll. 16 – p. 1127, ll. 2)

Mr. Lopez had told Officer Ornelas at the crash site that he believed the red light he saw was a car off the road on the right side.

> A: (Ornelas) He said after he got on 20 and he was traveling, he said he noticed a vehicle off the side of the road up ahead of him. Mr. Lopez told me that he – as he got closer, he slowed down, and as he got really close up to the vehicle, he moved over to his right – I mean, to his left, towards the center of the road. I remember Mr. Lopez was shaking his head. He goes, I don't know why they did it, but the car turned in front of me. Mr. Lopez told me that he tried to stop, but he was not able to stop his car, and he hit the car when it was right in the middle of the road. (Tr. Vol. I, p. 271, ll. 10 -20)

Dr. Gill explained that Mr. Lopez initially thought the red light was off the road on the right because of the darkness combined with a curve in the road.

> You can see from the photograph that the roadway bends to the right. So, for example, if Mr. Lopez is driving in the roadway here (indicating) and the Driver's Ed vehicle is off to the side of the road here (indicating) initiating the three-point turn, from where Mr. Lopez is looking, those lights are way off to the right of him because the road bends around to the right. So it's a logical conclusion on his part when he sees a light, it's off to the right of him, his immediate assumption is going to be it's a vehicle that's off the side of the road. That's a logical conclusion for him to draw. (Tr. Vol. II of II, p. 1129, ll. 2 – 12.)

Additionally, the testimony of witness, Hugh Derham, on visibility also corroborates the testimony of Mr. Lopez and Dr. Gill. (See Derham testimony, Tr. Vol. II, p. 837 ll. 1 – p. 839, ll. 4.)

5. <u>The School District Required Students to Obey a Teacher's Command</u>.

Dr. Gill also addressed the issue of Austin Hennefer obeying the instruction of his teacher and performing the three-point turn.

A: I think I was about to describe the phenomenon of transference of authority or social compliance.

Q: Okay. And let me just lay a little foundation. There's been testimony that Austin Hennefer was told to do a three-point turn at this location. Do you understand that?

A: Yes, that's my understanding from the material that I've reviewed.

Q: Okay. And you've also reviewed material that three-point turns are extremely hazardous, the most hazardous turnabout maneuver that can be performed; correct?

A: Correct.

Q: And that ordinarily a three-point turn shouldn't be done on high-speed highways; right?

A: Shouldn't be done unless it's an emergency situation in general.

Q: And Austin Hennefer was provided educational material explaining those concepts, as well as Mr. Mecham was provided the same educational material?

A: Right. I believe there were materials found in Austin Hennefer's locker that addressed that.

Q: Even though Austin may have been taught that this was not a proper place to do a three-point turn, wouldn't you expect him to protest when Mr. Mecham told him to do the three-point turn?

A: No, sir.
(Mr. Thomson: Objection. Calls for speculation.
The Court: More foundation.)

Q: (By Mr. Hepworth) Have there been studies done about expectations of people with authority figures?

A: Yes, sir.

Q: And could you describe those studies that have been about the concept of authority and what people will do?

Dr. Gill went on to explain the scientific studies that have been done which explain how normal adults obey authority figures. Dr. Gill gave examples of tests done to try to explain how the Nazi atrocities could have been committed. She also gave an example of how everyday drivers run red lights if directed to do so by a police officer. This testimony explains why Austin Hennefer obeyed Mecham's directive to do a three-point turn which was clearly extremely hazardous. (See testimony of Dr. Gill at Tr. Vol. II, p. 1147, ll. 4 – p. 1152, ll. 6 and p. 1163, ll. 7, - p. 1164, ll. 6.)

6. Misstatements in School District Appeal Brief.

The School District in its Statement of Facts made a number of inaccurate statements. It incorrectly states Ornelas testified he was traveling between 30 – 35 mph. In fact, Ornelas testified he drove 35 – 45 mph but slowed to 35 when he crossed a bridge, as was his habit.

> Q: (By Mr. Farley) And then when you – but you were traveling, like 35 miles per hour, 35 t0 40, at that point?
>
> A: Thirty-five, forty-five.
>
> Q: Did you even slow down before you even see the accident or you went across the bridge?
>
> A: Yes, I always slow down on that bridge. (Tr. Vol. I, p. 383, ll. 2 – 9.)

The School District incorrectly states "there was little or no traffic on Highway 20 near the time of the collision." That statement is incorrect. Obviously in addition to the driver's training car, there was the Lopez vehicle, Ornelas vehicle, and witnesses Hugh Derham and his passenger Petit saw the crash.

A: After we had turned onto 20, realizing there was a vehicle up there ahead, of course, it's good and dark out there, so the red lights, they stood out. And as we were proceeding on, the vehicle had – I'm going to say hit its – its brake lights had come on. And for the best it looked to me, from what I could see in the dark, it looked like it veered over to the left, and then it looked to appear to have stopped. So I assumed it had pulled over to the oncoming traffic shoulder and stopped. (Derham, Tr. Vol. II of II, p. 826, ll. 4 – 12.)

Mares testified that the driver's training car had to wait one to two minutes at the intersection with Highway 75 waiting for traffic to clear.

A: So he stopped, and he was – he stayed there for a while, he was looking all three ways you know. And there were a few cars coming down that Shoshone Hill – you know, going towards Shoshone, and there were a few cars coming, like from where we were going past west to Boise.

Q: Cars that were coming from Bellevue that were turning right to go towards Boise?

A: Yes.

Q: Okay. And cars coming down off Timmerman Hill towards Bellevue?

A: Yes.

* * *

Q: Did Austin have to wait a while before crossing Highway 75?

A: Yes, he stayed there for maybe, like, a minute or two, maybe more. (Mares, Tr. Vol. I, p. 478, ll. 20 – p. 479, ll. 22.)

Mares also testified there was a car in front of them at Gannett that drove faster than they did. (See Tr. Vol. I, p. 477, ll. 11 – 23.) Obviously the Lopez car left Carey and followed in close proximity to the School District car.

Ornelas testified that following the accident, cars were stacked up both to the east and west as you would expect on a highway during commute hours. (Tr Vol. I, . p. 376.). Ornelas also testified about another one-car slide off crash on Highway 20 near Gannett (Tr. Vol. I, p. 384) and that Officer Garwood was at the crash site before Ornelas (Tr. Vol. I, p. 388, ll. 14).

In addition to inaccuracies about the speed of Ornelas and the amount of traffic on the road, the School District incorrectly states "other locations to make a turn were not available." That is inconsistent with the testimony of the witnesses and photographs. In fact, defense counsel for the School District made a contrary judicial admission:

> Issues with respect to turnouts, which I think is something else that Ms. Gill had some opinions on, it was part of her inspection of the accident location, nobody has disputed that there were other possible places to turn around on Highway 20. If Ms. Gill is going to come into court and say, well, there were other locations where this vehicle could have turned round on Highway 20 and here's where they are, again, we've already been through it. It's not rebuttal to anything. (Counsel for School Dist. Mr. Thomson, Tr. Vol. II, p. 1105, ll. 17 – 24.

Despite this clear judicial admission that "nobody has disputed that there were other possible places to turn around on Highway 20," the School District incorrectly asserts in its brief: "Mr. Hennefer was unable to identify other locations that would have been visible to Mecham." This statement is directly contrary to Mr. Hennefer's testimony when he was asked about his investigation into his son's death.

> Q: Have you ever said to someone in the car, let's look for a safe place to turn around?

A: I have.

Q: Do you know what a safe place to turn around is?

A: I know what a safe place to turn around is.

Q: Could you show the jury a few places where it might have been safe to turn around?

A: This is the intersection over here (indicating). It's not shown. As you come through the intersection, you have a large turnout area in front of the gravel pit here (indicating). There's a lot of room right there. It's probably three cars wide. You could pull in there; or else you could have gone in behind this shed that it shows here (indicating) and been safe back here; or you could have turned into the Rest Area and come into here (indicating) and made the turn.

And then as you go down the road, you can see several driveways that you could have pulled into. This one here (indicating) we're not sure about. We think that one was put in at a later date.

And then in relation to where the crash was, it was somewhere right in here (indicating). The part that really stands out in the dark, this driveway and this yard has a big yard light, and in the dark it shows that yard up like a beacon. And, to me, that would have been a very safe place to have pulled into.

And then on down the road there are several other locations that a person could pull into. (Tr. Vol. I, p. 338, ll. 6 – p. 339, ll. 9.) (Emphasis added.)

In his testimony, Mecham also admitted other turn around locations were present. He may have offered excuses why he didn't use them, but the photographic evidence clearly shows multiple available places to turn around. Mecham offered testimony as follows:

> A: Yes, I did. When I did come – when I did wake up in the hospital, I – my full intentions were we were going to leave Carey, go through the blinking light, on the right hand side there is a gravel

> shed, we were going to pull off into the gravel shed and we were going to come back from Carey right there [sic]. (Mecham testimony in response to questions from Farley, Tr. Vol. II, p. 922, ll. 2 – 7.)

This testimony about his intentions is not credible and was inconsistent with his teaching habits. The evidence shows Mecham had a habit and practice to drive 30 minutes when he had two drivers and then turn around. (See Tr. Vol. I, p. 943, ll. 3 – 11.) Austin drove 30 minutes west and that is why Mecham decided to turn around in the middle of the road in an unsafe location. Austin's 30 minutes were up and it was time to switch drivers. Mecham intended to switch drivers so Ms. Mares could drive for 30 minutes back to Carey. Clearly, Mecham intended to drive west on Highway 20, a 65 mile per hour road. If it had not snowed, they would likely have driven 65 mph and much further down the road to do a three-point turn. However, it cannot be disputed that Mecham knew he could turn around at the gravel pit, a safe place. The School District's statement that there were no safe places to turn around is not true.

The Defendants claim that Austin had "substantial driving experience" as a 15-year old student driver that had only 3.33 hours of documented driver's experience. (See Ex. 86 Bates stamped 1308.) The allegation the 15-year old had "substantial driving experience is argumentative and untrue. He had experience driving off road on the farm, but no experience driving on the highway except in driver's training.

Q: Okay, was he allowed to ride his motorcycle on the road?

A: No.

Q: Did he ever, to your knowledge, ride his motorcycle on the highway?

A: No, other than to maybe cross the highway, but he never road it on the highway. (Tr. Vol. I, p. 321, ll. 18 – 24.)

The Defendants totally omitted the testimony of Brian Johns, Mecham's instructor that taught Mecham how to taught driver's training the summer before the crash. The School District omitted the testimony of Debbie Cottonware that reviewed Mecham's teaching records and omitted Mecham's testimony about his knowledge of his job duties. Rather than discuss those facts here in the Statement of Facts, the Hennefers will address the "reckless" evidence in the argument section of this brief.

## II.

## ADDITIONAL ISSUES PRESENTED ON APPEAL

The Hennefers contend the Trial Court erred when it failed to make an award of attorney fees as a sanction permitted by the Idaho Rules of Civil Procedure under Rule 37(c).

## III.

## LEGAL ARGUMENT

A. THE JURY'S FINDING THAT MECHAM'S ACTIONS WERE WILLFUL OR RECKLESS IS SUPPORTED BY SUBSTANTIAL EVIDENCE..

1. Substantial Evidence Standard of Review.

In Phillips v. Erhart, 151 Idaho 100 (2011), this Court was asked to consider whether there was sufficient evidence that Mr. Erhart's wrongful conduct was willful and "wanton misconduct." (See Phillips v. Erhart, 151 Idaho 100 at 107, heading.) That

case involved a trip and fall accident where the jury found Erhart intentionally failed to properly install two stair treads. The finding of the jury was upheld on appeal on a "substantial evidence" level of review. The same standards of review applies here.

2. Evidence of Willful Wrongdoing.

The Hennefers assert there is substantial evidence that Mecham intentionally instructed Austin Hennefer to perform the most hazardous turnabout maneuver, in the most hazardous visibility conditions, on the most hazardous road surface conditions, in the most hazardous speed location, and when he knew a car was hazardously close and in violation of I.C.§ 49- 645(1). Mecham intentionally failed to prepare a route plan that would teach the safest turnabout maneuver as required by his job duties. Mecham's intentional misconduct resulted in Austin Hennefer's death.

In order to prove what Mecham knew about his job duties, the Hennefers called Brian Johns to testify. Mr. Johns personally taught Mecham how to teach driver's training in the summer of 2010. Mr. Johns testified that Mecham demonstrated understanding of what he was taught. (Tr. Vol. I, p. 607, ll. 3 – p. 608, ll. 10.) Mr. Mecham had at least an 80% grade in the course and Mr. Johns graded Mecham's tests.

Mr. Johns testified that:

1. Mr. Mecham successfully completed a 12-week long intense course (Tr. Vol. I, p. 604, ll. 16 - 25.)

2. Mr. Mecham was taught Rule 2.3.6. It is a legal requirement for instructors to have specific written objectives for each drive.(Tr. Vol. I, p. 618, ll. 1 – p. 620, ll. 23.)

(a) Mr. Mecham was taught student driving logs shall be included in the student's records and maintained by the School. (Tr. Vol. I, p. 620, ll. 15 – 23.)

(b) Mr. Mecham was taught that he must document all six hours of driving and the objectives of each drive. (Tr. Vol. I, p. 621, ll. 1 – 25.)

(c) Mr. Johns gave Mr. Mecham sample driving logs to use with date, time, skills taught, driving time, instructor remarks, student initials. (Tr. Vol. I, p. 619 – 621.)

3. The goal of Driver's Ed – Safer Lifelong driving. (Tr. Vol. I, 622, ll. 17.)

4. Mr. Mecham knew Rule 4.9 Grade of Student Attitude – expect kids to do what told, when told. (Tr. Vol. I, p. 622, ll. 23.)

5. Mr. Johns taught Mr. Mecham three point turns are hazardous to perform because you must:

(a) cross traffic lanes

(b) stop across traffic lanes

(c) may put you in a high risk situation

(d) should rarely be used – only on dead end street or rural roadway with no driveways.

(e) three-point turn is the most dangerous. (Tr. Vol. I, p. 626, ll. 13 – P. 627, ll. 14.)

(f) the teaching objective is to teach the "safest maneuver to turn around." (Tr. Vol. I, p. 643, ll.14 - 22.)

6. Mr. Johns taught Mr. Mecham that planning driving routes was the most important part of every Driver's Education Program. (Tr. Vol. I, p. 630, ll. 12 – p. 631, ll. 9.)

(a) One of Mr. Johns "best assignments" to Mr. Mecham was to plan six hours of driving from the location Mr. Mecham would be starting from. (Tr. Vol. I, p. 629, ll. 15 – 19.)

7. The Idaho Drivers Manual was provided to Mr. Mecham that state: "The key to defensive driving is making a sound decision ahead of time rather than reacting to danger at the last second." (Tr. Vol. I, pg. 634, ll. 11 – 14.)

8. Night driving skills take time to develop which is why there is a Graduated Driver Licensing Program. (Tr. Vol. I, p. 635, ll. 17 – p. 636, ll. 11.)

9. The gray areas of twilight and dawn are the most dangerous times of the day for driving. (Tr. Vol. I, p. 637, ll. 3.)

10. Driving skills take time to develop and it is hard for young drivers to judge distance, (Tr. Vol. I, pg. 641, ll. 18 – pg. 642, ll. 4.)

11. It is the instructor's responsibility to look first before instructing a student to do a maneuver. (Tr. Vol. I, pg. 680, ll. 12 - 15.)

At trial, Mecham admitted actually knowing the rules of teaching driver's training and also admitted violating the rules, which proves willful and reckless conduct. As to the points enumerated by Mr. Johns, Mecham testified as follows:

1. Mr. Mecham admitted he took Brian Johns' driver's instructors' training course the summer before the crash on October 26, 2010, and became a certified instructor (Tr. Vol. II, pg. 930, ll. 11 – 22.) and described Mr. Johns as a "fine" teacher.

2. Mr. Mecham admitted he was taught that he was required to keep written records of the skills taught and hours driven by each student. (Tr. Vol. II, p. 935, ll. 23 – p. 936, ll. 1).

3. Mr. Mecham admitted he was "interested teaching, to be able to take a class and be able to teach the entire class one curriculum and be able to plan for that curriculum." (Tr. Vol. II, p. 897, ll. 1 – 11.)

4. Regarding student attitude he said Austin trusted Mr. Mecham and had always done what Mr. Mecham asked him to do. (Tr. Vol. II, pg. 952, ll. 10 – 22.)

5. With respect to Mr. Mecham's actual knowledge about three-point turns he testified:

(a) He had a copy of the Drive Right Manual (Tr. Vol. II, p. 901, ll. 9 – 22.) (Ex. 77.)

(b) He was taught about the relative risks or hazards of each turnabout. (Tr. Vol. II, p. 901, ll. 23 – p. 902, ll. 2.)

(c) He made a copy of the Drive Right Manual section on turnabouts for each student "because it was more in detail than we had kind of covered in class." (Tr. Vol. II, p. 912, ll. 13 - 24.)

(d) He knew three-point turns should be practiced in an area where there was no traffic. (Tr. Vol. II, p. 940, ll. 20-22.)

(e) He "assumed" it would be fine to practice three-point turns in high-speed traffic, (Tr. Vol. II, p. 941, ll. 6 – 10.)

(f) He admitted he was taught and knew on the day of the crash that a three-point turn "is hazardous to perform , you not only cross traffic lanes, but your vehicle is stopped across a traffic lane. Executing this maneuver may put you in a high risk situation." (Tr. Vol. II, p. 967, ll.6 – 14.)

(g) He admitted he knew a three-point turn should rarely be used. Use this turnabout only when you are on a dead-end street or on a rural roadway with no driveways. (Tr. Vol. II, pg. 969, ll. 5 – 8.)

(h) Mr. Mecham claimed in his testimony (although the records don't corroborate) (Tr. Vol. II, p. 939, ll. 5 – 22.) that he taught Austin to perform a three-point turn in a subdivision behind the school because there was no traffic and only two houses. (Tr. Vol., II, p. 940, ll. 6 – 22.)

6. Mr. Mecham admitted being taught to use route plans (Tr. Vol. II, p. 906, ll. 13 – 18.) but there is no evidence of a written route plan being used ever by Mr. Mecham.

7. Mr. Mecham admitted the last memory he had before waking up in the hospital was looking over his left shoulder and seeing headlights coming. (Tr. Vol. II, p. 942, ll. 12 – 25.)

Given Mecham's experience driving and teaching his students to perform three-point turns in the subdivision behind the school, he would naturally know how long it takes to perform a three-point turnabout. Although Mecham did not testify about the length of time, two experts did. The Hennefers' expert testified that he performed three-point turns, which he timed, and they took between 12.1 seconds to 16.5 seconds and the average was 14.3 seconds to complete after five or six attempts. (Tr. Vol. II, p. 540, ll. 18 – p. 541, ll. 6.) The School District's expert Mr. Maddux also performed a three-point turn experiment wherein he completed the turn in 12 seconds but estimated it could take as long as 25 seconds for an inexperienced driver to do a three-point turn on icy roads. (Tr. Vol. II, p. 1058, ll. 4 – p. 1059, ll.17.)

The Hennefers' reconstruction expert, Robert Lauman, testified he believed the Buick was about 90% finished with completing the three-point turn. If that is correct and it took 12 seconds to complete the turn in the best case scenario for Mecham, then Mr. Lopez was about 10.8 seconds away when the three point turn was started. At 50 mph (73 feet per second, Tr. Vol. II, p. 548, ll. 16 – 18.), Mr. Lopez was only 788.4 feet away from the crash site. Based on the testimony of the experts, the headlights of the Lopez Honda would have been visible to Mecham before Mecham instructed Austin Hennefer to do the three-point turn. (Tr. Vol. II, p. 1067, ll. 2 – 7. – Maddux) (Tr. Vol. II, p. 1127, ll. 21 – p. 1128, ll. 8. – Dr. Gill.)

Given the evidence about the amount of traffic observed by Ms. Mares and the fact Mecham grew up in Carey, he was very familiar with Highway 20 and knew the

commute times were 7:00 or 7:30 a.m. (Tr. Vol. II, p. 976, ll. 13). The evidence is substantial that Mecham acted intentionally and recklessly.

3. Motion for Summary Judgment, Motion for Directed Verdict, Motion for Judgment Notwithstanding Verdict, Motion for New Trial and Appeal Should be Denied.

The same evidence presented a trial was submitted to the Court in opposition to the School District's Motion for Summary Judgment. (See, R. Vol. 1 of 2, p. 142 – 224). The Court recognized the issue of recklessness was an issue of fact for the jury to resolve and correctly denied the motions. (Tr. Vol. I, p. 35 – 44). The Court denied the subsequent motions on the same basis and ultimately agreed the evidence supported the jury's finding of recklessness or intentional misconduct.

4. Conclusion.

The School District appears to argue that Mecham was merely incompetent or simply negligent. However, that claim is totally inconsistent with Mecham's own testimony. Mecham specifically and clearly admitted he knew three-point turns were the most hazardous turns. He admitted knowing that the vehicle would be stopped across a traffic lane which may put you in a "high risk situation." He also admitted looking over his shoulder and seeing headlights before the crash. The School District's argument that Mecham did not know the hazards is inconsistent with Mecham's own testimony.

B. THE JURY AND TRIAL COURT CORRECTLY FOUND MECHAM'S CONDUCT INTENTIONAL AND RECKLESS.

The jury and Trial Court correctly concluded the evidence supported a claim that Mecham acted willfully and recklessly:

> THE COURT: Okay. Thank you.
>
> Whether the route plan included a three-point turn and whether Mr. Mecham was complying with his route plan when he had Austin execute a three-point turn, and that's in the evidence, that Austin was directed to execute a three-point turn, so whether Mr. Mecham had that turn executed because Austin's 30 minutes were up or whether conditions were worsening or whether that was exactly what he had planned – what Mr. Mecham had planned all along, those are questions for the jury. And, frankly, the jury could come to differing interpretations of those things.
>
> The evidence of recklessness, to me is that Mr. Mecham violated what he was taught. The evidence is that Austin was directed to do a three-point turn on an icy road, on a high speed two-lane highway in twilight conditions, and the driver's training instructions that he's given tell him that if you're going to execute a three-point turn, you do it on a dead-end street, you do it on a low speed road with no traffic. And, to me, that's the bottom line.
>
> So, like I say, the other things, exactly when, where, why, and how he determined that he would have Austin execute that turn are subject to differing interpretations. The fact is that the road conditions were evident to Mr. Mecham, the time of day, the icy conditions, the fact he's got a young student with minimal driving time, but he's having him do it on a high speed two-lane road in bad visibility. (Tr. Vol. II, p. 779, ll. 16 – p. 780, ll. 23.) (Emphasis added.)

C. THE COURT'S RECKLESS INSTRUCTION WAS CORRECT.

The School District has argued at summary judgment, in its post-trial motions, and now on appeal that the definition contained in I.C. § 6-904C.2 applies to I.C. § 6-

1603. (See, R. Vol. 1 of 2, p. 122, Vol. 2 of 2, p. 396 – 403). By the express terms of I.C. § 6-904C, that definition only applies to Chapter 9.

> 6-904C Definitions. – For purposes of this chapter and this chapter only, the following words and phrases shall be defined as follows:
>
> 2. "Reckless, willful, and wanton conduct is present only when . . . I.C. § - 904C (Emphasis added.)

Title VI, Chapter 9 deals with situations where a governmental entity may be held liable just like a private person or situation where there is qualified immunity with a heightened negligence standard that may require reckless conduct or in some cases conduct where there is a specific intent to injure. None of the qualified immunities were pled or apply here. Therefore, Chapter 9 definitions do not apply to Chapter 16 related to the damage cap.

This issue was addressed in a case cited by the School District but the School District chose to ignore both the clear legal precedent and the express language of the statute.

> The district court also adopted the definition in Idaho Code § 6-904C for the reckless disregard standard contained in § 49-623. Again, the district court erred. Idaho Code § 6-904C defines the phrase "reckless, willful and wanton conduct" as it is used in the Idaho Tort Claims Act. The statute expressly provides that the definition applies only to Chapter 9 of Title 6, Idaho Code. By its terms, it does not apply to Chapter 6 of Title 49, Idaho Code. Athay v. Stacey, 142 Idaho 360 at 365 (2005).

Interestingly, the Idaho Supreme Court reversed the district court's grant of summary judgment on the issue of recklessness. The Supreme Court found the

definition contained in I.C. § 6-904C was not the proper definition and found that the issue of recklessness was a fact issue for the jury.

In Carrillo v. Boise Tire Company, Inc., 152 Idaho 741 (2012) and Phillips v. Erhart, 151 Idaho 100 (2011) the same Idaho Pattern Jury Instruction was used and cited by the Idaho Supreme Court with apparent approval. The Court specifically referenced the "reasonable man" objective standard as opposed to the "actual" knowledge standard urged by the School District.

> We affirm the trial court and hold that willful or reckless misconduct is a form of negligence that involved both intentional conduct and knowledge of a substantial risk of harm. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency in that reckless conduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. Carrillo v. Boise Tire Company, Inc., 152 Idaho 741, 274 P.3d 1256 at 1266 (2012) (Emphasis added.)

The express terms of I.C. § 6-904C preclude the use of those definitions anywhere except Chapter 9. Idaho case law has established Chapter 9 definitions cannot be used in other titles or chapters. The School District's continued arguments to that end are frivolous and totally without foundation. Instruction No. 20 (R. Vol. 1, p. 218) was the proper reckless instruction.

D. THE SPECIAL VERDICT WAS PROPER.

The School District claims the order in which the Court asked the jury to answer whether Mecham's conduct was reckless "over emphasized the element of

recklessness." There is no explanation of how the order of the question might prejudice the School District. Clearly, the question posed had to be answered and there is no objection to the way the question was worded. The Court properly exercised its discretion on the order of questions. It seems logical to ask the reckless question after the negligence questions and before the damage questions. Given the School District cites no authority in support of their claims of prejudice, it is accurate to say it is not supported by any legal precedent cited by the School District.

E. THE LOOKOUT INSTRUCTION REQUESTED BY THE SCHOOL DISTRICT WAS PREJUDICIAL, DID NOT REFLECT THE EVIDENCE AND IS NOT STATUTORY.

The School District did request the following "lookout instruction."

> The law requires that all drivers keep a proper lookout. Vehicle operators are required to keep their vehicles under control at all times, considering actual and potential hazards. It is not only the duty of the operator to look, but it is his duty to see and be cognizant of that which is plainly visible or obviously apparent, and a failure on his part in this regard, without proper justification or reason, makes him chargeable for a failure to see what he should have seen had he been in the exercise of reasonable care (R. Vol. 1 of 1, p. 146.)

The Court rejected the instruction on the basis that it was already covered in Instruction 19 regarding speed under the conditions (Tr. Vol. II, p. 1214 – 1215) and that all of the witnesses had agreed that "you have to keep a proper lookout" is a rule of the road. Ultimately, the Court rejected the instruction because it is covered in the general negligence instruction and should apply to all three parties including Mecham. (Tr. Vol. II –p. 1231, ll. 6 – 23.)

The most objectionable part of the instruction to the Hennefers is that it only required Austin Hennefer and Mr. Lopez to keep a lookout as "drivers." If given, the jury would have been instructed Mecham had no duty to keep a lookout (because he was not a driver). Mecham had been taught that he was required to look before instructing a student to perform a maneuver. (Tr. Vol. I, pg. 680, ll. 12 – 15.) He also admitted knowing Austin would do what he was told to do. (Tr. Vol. II, p. 952, ll. 10 – 22.) Therefore, the instruction was highly prejudicial and misleading because it ignored the duties of an instructor that was in charge of the student and entitled to be obeyed.

Instruction No. 9 and No. 10 properly instructed the jury on negligence (R. Vol. 1 of 1, p. 207, 208.) Instructions No. 15 – 19 accurately set forth the respective obligations of the parties. (See, R. Vol. 1, p. 213 – 217.)

An instruction should not be given if it is an erroneous statement of law, not supported by the facts or adequately covered by other instructions. Vanderford Co., Inc. v. Knudson, 144 Idaho 547 at 555 (2007). For each of those reasons, it was proper not to give the lookout instruction requested. The instruction erroneously relieved Mecham of the duty to keep a lookout. The instruction was not supported by the facts. It was Mecham that should have seen Mr. Lopez' headlights. It was clear the marker light was actually seen by Mr. Lopez, but it was very difficult to recognize the marker light that appeared to be off the road as a hazard until the Buick pulled out in front of Mr. Lopez. Lastly, taken as a whole, the jury instructions accurately covered the law.

Jurors certainly know it is necessary to pay attention to the road in order to drive. The School District's expert testified it was his opinion that Mr. Lopez "had plenty of time to have been able to have seen what was going on up the road ahead of him, and he had enough time that he could have slowed down and come to a stop long before the collision ever occurred. (Tr. Vol. II, p. 1025, ll. 16 – 20.)

The Hennefers' reconstruction expert, Mr. Lauman, was cross-examined by the School District about the duty to keep a lookout.

> Q: And you would agree that drivers should keep a proper lookout to observe any hazards that may be in the roadway; would that be fair?
>
> A: Drivers and in this case the Driver's Ed instructor, yes.
>
> Q: And that same principle would apply to Mr. Lopez-Rodriguez, correct?
>
> A: That's right. (Tr. Vol. I, p. 555, ll. 25 – p. 556, ll. 7.)

There was no dispute about the duty to keep a lookout. The issue in the lawsuit was whether Mecham could see the Lopez headlights and recognize that as a hazard. The other visibility issue is whether Mr. Lopez should have recognized the "red marker light" as a hazard sooner. There was no dispute Mr. Lopez saw a red light, he admitted he did. Therefore, any error is harmless. The School District has not met its burden of proving prejudice. "Reversible error only occurs when an instruction misleads the jury or prejudices a party. Manning v. Twin Falls Clinic & Hospital, 122 Idaho 47, 51 (1992).

F. THE COURT PROPERLY EVALUATED THE DAMAGE EVIDENCE AND DENIED THE MOTION FOR A NEW TRIAL.

It is clear from the hearing transcripts that the trial judge properly weighed the evidence and arrived at a damage figure similar to the jury's. The Court specifically stated on the record his understanding of his obligations.

> It is important for the Court to enunciate in these new trial motions that the Court knows and understands the standards for a new trial. The Court weighs the evidence, compares its assessment of the evidence with the verdict. The Court determines whether a retrial has a probability of producing a different result. The Court makes its own assessment of the credibility of the witnesses and weighs the evidence. If the verdict is not in accord with the clear weight of the evidence, the Court should grant a new trial. (Tr. Vol., II of II, p. 1288, ll. 16 – 25.)

After correctly reciting the proper standard, the Court went on the record and verbalized his assessment of both liability and damages. (Tr. Vol. II, p. 1289 – 1303.) With respect to the damages awarded, the Court ultimately concluded.

> The plaintiff has pointed to multiple verdicts that run from $250,000.00 to $9 million. I want to point out that the verdict here was unanimous. I would say that any person who could stand here and say that the jury got it wrong in this case did not listen to the evidence. I agree with Mr. Hepworth that the relationship of the parents to the child was very close. I think the jury measured that. I cannot say that the disparity between the jury's award and what the Court would have awarded was so great as to suggest the award was what might have been expected of a jury acting under the influence of passion or prejudice. If I had been on that jury, I cannot say my verdict would have been any different. (Tr. Vol. II of II, p. 1300, ll. 6 – 18.)

Other interesting comments from the Court:

> I think what I've already heard from counsel is that Blaine County juries are very smart. That would be my observation. (Tr. Vol. II of II, p. 1296, ll. 4 – 6)

He also commented that Blaine County juries tend to be very "unsympathetic." (Tr. Vol. II of II, p. 1294, ll. 15 – 24.) He also quoted the jury foreman's comment in voir dire?

> The jury foreman, who disclosed he was a lawyer during voir dire, I think said it very well. One of counsel asked him, you know, you're a lawyer, what do you think of this, this process, picking the jury. And he said I've been sitting here listening and thinking, and he said, "what's a human life worth"? And that was the whole question in the case. What's a human life worth. I think the plaintiff proved its case and the jury gave their opinion of what a human life is worth – or what this human life was worth. (Tr. Vol., II of II, p. 1297, ll. 1 – 6.)

There is no magical formula for determining the value of a parent's loss of a child. Every jury will be different and every parent/child relationship is different. The jury determined Mrs. Hennefer's loss was greater than Mr. Hennefer's for instance. That is likely the perception that Mrs. Hennefer's role was as a nurturer and Dennis Hennefer's role as a provider. Mrs. Hennefer had more quality time with her son working at the school compared to Dennis who worked in Hailey. In any event, it appears the jury closely analyzed the unique evidence and made a reasonable award, as did the Judge who concurred with their assessment.

G. NO EVIDENCE OF PASSION OR PREJUDICE.

The School District claims the Hennefers appealed to passion by pointing out Mecham's violation of his duty to properly keep students' driving records. The School District claims there was no such duty. The evidence is otherwise. Exhibit 85-B Bates stamp Nos. 49 – 65 was admitted into evidence and is entitled Operating Procedures for

Idaho Public Driver Education Programs. Mr. Johns testified he wrote the legal requirements which are IDAPA 08.02.02.004. Provision 2.3.6 provides:

> 2.3.6 Each drive must have specific, written objectives. (See Ex. 85-B pages Johns 00054HEP.)

Mr. Johns testified about the legal requirements of having written objectives for each drive and maintaining driving logs as part of the students' permanent record. (See Tr. Vol. I, p. 618 – 621.) Mecham testified he understood those legal requirements (Tr. Vol. II, p. 935, ll. 23 – p. 936, ll. 1.) Debbie Cottonware, who finished Mecham's class after the crash, testified that she essentially had to re-teach the entire class because the driving records kept by Mecham were so inadequate there was no way to know what driving skills the kids had been taught or practiced. (Tr. Vol. I, p. 701, ll. 5 – p. 703, ll. 12,) Exhibit 86 pages 1350 – 52 were admitted showing hours driven, Exhibit 86 numbers 1348 – 49 were admitted which was the XYZ driving log for Austin Hennefer kept by Mecham. Exhibit 56 was the driving log kept by Austin Hennefer which was admitted into evidence. Mecham had kept a driving log of one drive on September 14, Austin had kept a log of drives 1, 2, 7, and 9. According to the School District records and the testimony of Ms. Cottonware, Austin drove 3.33 hours in drives that lasted 20 minutes or 30 minutes and totaled nine drives. See Exhibit 86 pages 1350 – 52 and Ms. Cottonware's testimony (Tr. Vol. I, p. 697, ll. 8 – p. 699, ll. 221). The evidence is clear Mecham knew his obligation to keep written records and intentionally failed in his responsibilities.

With respect to the School District's refusal to take responsibility for the reckless conduct of its instructor, that was a tactical decision made by the School District. Their defense was clearly rejected by the jury. The School District can't give credit to the Hennefer's counsel for the School District's decisions.

The remaining argument about traffic, Austin's limited driving experience, and visibility are supported by the evidence and disputed fact issues. Substantial evidence supported the jury's decision.

Counsel for the Hennefers asked the jury to award $2.5 million for each parent. The jury rejected that request. It should also be kept in mind the School District has some control over the amount of damages that can be recovered. A governmental entity must carry insurance of $500,000.00 under the tort claims act. This School District and its insurer chose to carry higher limits. This is a reflection of both the insurers and School's recognition of potential damage awards. It is curious that the insurer now claims they sold too high of a limit. It likely didn't seem too high when they collected the premiums.

H. NO PUNITIVE DAMAGES WERE REQUESTED.

The Court did not give an instruction on punitive damages and no argument was made in that regard. The School District's argument is totally unsupported.

It is the opinion of counsel that juries tend to award less money when liability is a difficult decision, less money when the claimant is unlikeable and less money when it appears the claimant is motivated by greed, the so-called "green-eyed monster."

However, where the Defendant's liability is clear but hotly contested, the Defendant's appear uncaring about the damage they have caused and grossly undervalue the damage they have caused, a jury will often assess damages representing 100%. This jury did not discount the damages because the defense was not meritorious.

I. NEW TRIAL MOTION PROPERLY DENIED.

The Trial Court clearly did not ignore the foreseeability element. The Trial Court properly recognized three-point turns should be practiced only in appropriate locations, like dead end streets or remote rural roads. Mecham was specifically taught and knew they were a hazardous maneuver and the least safe. There were multiple options available to Mecham and he simply planned to practice the most hazardous turnabout on a hazardous high-speed highway, in the most hazardous lighting conditions. As he drove down the road he clearly knew the road surface was extremely slick and hazardous and knew there was traffic present. He knew how long it takes to have an inexperienced student do a three-point turn. He knew they should be practiced in a low speed, low traffic area because that's where he had practiced before. Despite all of that, he proceeded to do a three-point turn directly in front of an oncoming car and now blames the car driver, Mr. Lopez, for not stopping. The Court and jury responded appropriately and any reasonable jury would do the same.

J. DR. JOELLEN GILL'S TESTIMONY WAS HELPFUL AND PROPER.

Dr. Gill was the only expert to go to the accident scene with two vehicles at twilight to evaluate visibility from the perspective of Mr. Lopez and Mecham. Therefore, her testimony complied with I.R.E. 702. Dr. Gill's testimony was based on engineering and psychology credentials and her experience and training as a human factors expert. Extensive foundation was laid. Her testimony was clearly in rebuttal to the School District's expert witness Mr. Maddux who claimed Mr. Lopez should have been able to see the School District's Buick and come to a stop before colliding. Dr. Gill's testimony indicated a marker light off to the right of the road may not cause a driver to immediately recognize the need to make an emergency stop. The light would be confusing based on her experience as well as her observations at the crash site in similar light of night.

Dr. Gill's testimony about the "transference of authority" psychological studies and the example of a police officer waving traffic through a red light (Tr. Vol. II, p. 1163, ll. 7 – p. 1164, ll. 6.) was also helpful to rebut the School District's claim that Austin Hennefer was negligent. The Court properly exercised its discretion to admit the evidence.

The Supreme Court reviews trial court decisions admitting or excluding evidence for an abuse of discretion. Highland Enterprises Inc. v. Barker, 133 Idaho 330, 345 (1999). The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror. State v. Hester, 114 Idaho 688 (1988).

It is clear in this case that Judge Elgee severely limited the topics to be addressed by Dr. Gill. (R. Vol. 1, p. 118 – 119.) Further, the Court entertained the School District's objections at trial. (Tr. Vol. II, p. 1103 – 1112.) The Court specifically determined that it would be necessary to address questions as they came up at trial and recess the jury to evaluate the testimony before the jury was allowed to hear her testimony. (Tr. Vol. II, p. 1112, ll. 16 – 21.)

A proper foundation was presented establishing her engineering, psychology, and human factors credentials (Tr. Vol. II, p. 1113, l. 14 – p. 1121, ll. 9.) She described her review of depositions, research materials and visit to the crash site with two cars at twilight. (Tr. Vol. II, p. 1121, ll. 18 – p. 1123, ll. 19.) Extensive argument and an offer of proof was then made outside the presence of the jury. (Tr. Vol. II, p. 1123, ll. 20 – p. 1124, ll. 19.) The Court ruled that her testimony on visibility of a vehicle perpendicular in the road was proper rebuttal testimony of the School District's expert witness Mr. Maddux who testified Mr. Lopez had plenty of time to see the School District car and stop. (Tr. Vol. II, p. 1124, ll. 24 – p. 1125, ll. 7.) She was then able to explain Lopez's testimony (through Ornelas) that he thought the School District car was off the right side of the road. Her testimony, based on scientific human factor training and engineering background on perception/reaction, helped explain the car appeared to be off the side of the road because only a red marker light was visible off to the right in darkness. In the light of day we know the road curves to the right.

Dr. Gill explained there is a great deal of literature and studies done on driver behavior, eye scans, where people focus their visual gaze and factors of day driving versus night driving. (Tr. Vol. II, p. 1130, ll. 8 – 23.) Her opinions based on scientific evidence were helpful and also necessary because Mr. Lopez did not speak English and was not even called as a witness at trial due to the language barrier. Dr. Gill's opinion helped explain why Mr. Lopez had very limited visibility of the School District car. (Tr. Vol. II, p. 1131, ll.17 - p. 1133, ll. 15.)

Dr. Gill was asked about Mecham's actions and there was no objection by defense counsel. (Tr. Vol. II, p. 1133, ll. 16 – p. 1134, ll. 18.) When the School District interrupted and objected, the objection was sustained and no further testimony on that topic was offered. (Tr. Vol. II, p. 1134, ll. 19 – 25.) When Dr. Gill was asked about Austin Hennefer's conduct, defense counsel objected that it was improper rebuttal. The matter was taken up outside the presence of the jury and an offer of proof made. (Tr. Vol., II, p. 1135, ll. 10 – p. 1140, ll. 17.) During argument the School District argued the evidence they presented established Austin Hennefer was negligent. (See, Tr. Vol. II, p. 1141, ll. 14 – 21.) After recognizing the School District contended Hennefer was negligent for executing the three-point turn and not looking for traffic, the Court allowed the testimony that helped explain why a student would follow the negligent and reckless instruction of his teacher. (Tr. Vol. II, p. 1146, ll. 13 – 25.)

The transcript clearly reveals the Court took great pains and time as well as liberal argument before making a decision to allow the testimony of Dr. Gill. Clearly the

transference of authority testimony was based on well-known scientific studies. It was proper rebuttal to the School District's affirmative defense of comparative negligence of Austin Hennefer. It was not an abuse of discretion to allow the very limited testimony. It should also be pointed out that Austin Hennefer died in the car crash and was unavailable to defend his own actions. Therefore, the expert scientific testimony of Dr. Gill was the only way for Austin Hennefer's side of the story to be told.

K. THE TRIAL COURT ERRED WHEN IT RULED THE SUPREME COURT RULE MAKING AUTHORITY WAS PRE-EMPTED BY THE LEGISLATIVE ENACTMENT OF I.C. § 6-918A.

The Hennefers applied for an award of attorney fees as sanctions under Rule 37(c) for the School District's denial of requests for admissions that Mecham was negligent in causing the crash and Austin Hennefer did not cause the crash. (See, CR Vol. 2, p. 283 – 84 and the Supplemental response dated April 5, 2013, (CR Vol. 2, p. 289 – 90).)

It was unreasonable for the School District to claim Austin Hennefer was negligent but Mr. Mecham was not negligent considering Austin was only obeying Mecham's command. Certainly the teacher has at least primary responsibility. Therefore, an award of attorney fees under I.R.C.P. 37(c) was mandatory. Under the rule, an award is mandatory unless an exception applies.

. . . The Court shall make the order unless it finds . . .. (I.R.C.P. 37(c).

The award of attorney fees for a failure to admit negligence was upheld on appeal in Contreras v. Rubly, 142 Idaho 573 (2006), Ruge v. Posey, 114 Idaho 890 (Id. App. 1988), and in Marchand v. Mercy Medical Center, 22 F.3d 933 (9th Cir. 1994).

The School District timely objected to the award of attorney fees and claimed I.C. § 6-918A precludes an award under I.R.C.P. 37(c). The Hennefers responded claiming the Idaho Supreme Court has authority under its court management role to award attorney fees despite the legislatures prohibition In support of that claim Hennefer cited Kent v. Pence, 116 Idaho 22 (Id. App 1989) wherein the Court of Appeals ruled I.R.C.P. Rule 11 sanctions allowed an award of attorney fees as sanctions under Rule 11.

> In our review, Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigation misconduct within the overall course of a lawsuit. So understood, it is not the type of "rule of court" the legislature intended to displace with I.C. § 6-918A. Kent v. Pence, 116 Idaho 22 at 23, 773 P.2d 290 at 291 (App. 1989).

The jury determined Mecham was 100% at fault for causing this collision that resulted in Austin Hennefer's death. They ruled Mecham's conduct was willful or reckless. The School District was careful not to point the blame very directly at Austin Hennefer, but they refused to admit Mecham was negligent or that Austin Hennefer was not negligent. Rule 37(c) is designed to expedite trials and give an incentive to admit the truth and a disincentive to deny the truth. The Supreme Court should have the power to enforce its rules to minimize and streamline litigation without interference from the legislature. The Hennefers request the Court to reverse the Trial Court which ruled as a

matter of law that it had no legal authority to award attorney fees due to I.C. § 6-918A. (Tr. Vol. II, p. 1315.)

L. AWARD OF ATTORNEY FEES UNDER I.C. § 6-918A.

The Hennefers request an award of attorney fees on appeal pursuant to I.C. § 6-918A. The appeal in this case is primarily focused on requesting this Court to second guess the jury's findings of fact. The issues of negligence, comparative negligence, willful and reckless negligence, and the amount of damages are all fact findings. It is clear there is substantial evidence supporting the jury's decision. In fact, there was little dispute as to what happened and that it was totally inappropriate to attempt a three-point turn at the time and place. Overall, this appeal is being pursued in bad faith. The Appellant did not have to post an appeal bond as it is a governmental entity. Essentially this is a relatively free delay tactic save for the prospect of paying 5.25% interest. The standard for an award of attorney fees is difficult under I.C. § 6-918A. The statute should not be used to avoid justice.

## VI.

## CONCLUSION

The jury's finding that the School District was 100% responsible for causing the crash and the wrongful death of Austin Hennefer and the serious injury of Jennifer Mares is clearly supported by substantial and overwhelming evidence. Idaho case law is clear that an objective standard applies to the definition of "reckless" in I.C. § 6-1603 and that I.C. § 6-904C only applies to Chapter 9 cases dealing with qualified immunity.

The award of $1.5 million to Dennis Hennefer and $2.0 million to Maryann Hennefer is based on substantial evidence. The Court's decision to allow some but not all of Dr. Joellen Gill's testimony was clearly not an abuse of discretion. The Hennefers request this Court to affirm the jury's award and award attorney fees per I.R.C.P. 37(c) and on appeal per I.C. 6-918A.

DATED this 25th day of July, 2014.

JEFFREY J. HEPWORTH, P.A.
& ASSOCIATES

By Jeffrey J. Hepworth
Jeffrey J. Hepworth
Attorneys for Plaintiff/Appellant

## CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 161 5TH Avenue South, Suite 100, Twin Falls, Idaho, certifies that on the 25th day of July, 2014, he caused a true and correct copy of the RESPONDENTS' BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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